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CIVIL RIGHTS COMMISSION

STATE OF HAWAII

WILLIAM D. HOSHIJO, Executive)
Director, on behalf of the)
complaint filed by SHAWN M.)
SMITH,)

DOCKET NO. DR 98-0012

vs.)

TABERU MANAGEMENT, INC. dba RB)
HONOLULU #1 and ARBY'S INC.)

Respondents.)
_____))

ORDER SUMMARILY DENYING PETITION FOR DECLARATORY RELIEF

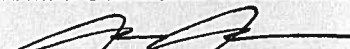
I. INTRODUCTION

On February 27, 1998, the Executive Director ("Petitioner") filed a Petition for Declaratory Relief seeking a declaration: "Whether the Hearings Examiner correctly applied H.A.R. § 12-46-6.1 and the law in denying the Executive Director's Motion to Amend filed 1/13/98[?]" Raymond G. David ("David") filed a Memorandum in Opposition to the Petition on March 13, 1998. Respondents Taberu Management, Inc. ("Taberu"), and Arby's Inc. ("Arby's") did not file any memoranda.

II. MOTION TO AMEND

The Motion to Amend before the Hearings Examiner sought to add David as a party in his capacity as an agent of Taberu and hold him personally liable for discriminatory practices against Complainant Shawn M. Smith ("Smith"). The decision to add David was made after

I hereby certify that this is a true and
correct copy of the original on file at the
HAWAII CIVIL RIGHTS COMMISSION.



Taberu's insurer filed for bankruptcy in 1997¹.

Petitioner determined that Taberu had no assets to satisfy a judgment for Smith, and alleged that David, as Taberu's president, had approved or acquiesced in the decision not to reinstate Smith after she gave birth and had personally profited from the sale of Taberu's fast food franchise to Arby's². The sale to Arby's was conditioned upon the termination of all Taberu's employees and was allegedly cited by David as the reason for not reinstating Smith. See, Exhibit A, attached to Petition for Declaratory Relief.

H.A.R. § 12-46-6.1(a) provides, "After commencement of proceedings, amendments may be granted by the hearings examiner." H.A.R. § 12-46-6.1(b)(2) provides, "An amendment may be made ... [t]o clarify or amplify allegations, to add new causes of action or defenses, or add new parties." After receiving memoranda from the parties and hearing argument, the Hearings Examiner denied the motion to amend. Order Denying Executive Director's Motion to Amend Complaint to Add Raymond G. David as a Respondent, filed on February 13, 1998.

¹According to the Motion to Amend filed with the Hearings Examiner on January 13, 1998, Taberu's insurer Resure, Inc. sought bankruptcy protection in February 1997. Memorandum in Support of Motion, at 9.

²Smith submitted an affidavit in support of the Motion to Amend alleging that she telephoned David after being informed by a Taberu vice-president that she would not be reinstated after her pregnancy. David allegedly informed her that under the terms of the agreement with the Arby's, the purchaser of the franchise, all employees would be terminated as a condition of the sale.

III. STANDARD FOR DECIDING PETITION

H.A.R. §§ 12-46-63(b)(1) and (2) provide:

With respect to each petition to be considered, and as expeditiously as possible, the commission shall:

- (1) Summarily, and in writing, deny the petition, setting forth the reasons for the denial and advise petitioner of the right to request reconsideration or judicial relief or grant the relief sought either as prayed for or as modified by the commission, setting forth the reasons therefor and advise respondent, if any, of the right to request reconsideration or judicial relief; [or]
- (2) Set the petition for argument before the commission in accordance with this subchapter;

The Commission chooses to summarily deny the Petition based upon the submissions of Petitioner and David.

IV. DISCUSSION

The Commission recognizes the importance of enforcing Hawai'i's anti-discrimination laws to provide full relief to victims of discrimination. Hawai'i Const., Art. I, Sect. 5; H.R.S. §§ 368-1 and 17. While H.A.R. § 12-46-6.1(a) does not specify the standards to followed by the Hearings Examiner in deciding a motion to amend, the Commission recognizes the need to balance the goal of full relief with the prejudice to potential parties sought to be included by an amendment to the complaint during the contested case hearing process.

Smith knew of David's alleged participation in the decision not to reinstate her at the time she filed the administrative complaint, on October 3, 1994. See, Affidavit of Smith, attached to Motion to Amend. The administrative complaint names a Taberu vice president as the person making the decision, but it does not

mention David nor allege his involvement in the reinstatement decision.

After the complaint was served, the Executive Director conducted an investigation³ and made a reasonable cause determination naming Taberu and Arby's as the parties who had discriminated against Smith. Thus, David did not have notice that the Executive Director believed that he had violated the law as an agent and could be held personally liable.

Petitioner notes that David was informed about conciliation efforts by the attorney for the insurer, however, it appears that David did not participate in conciliation efforts in any capacity. After conciliation failed, the complaint was docketed for hearing.

The Commission believes that under the circumstances it would be unfair to allow an amendment of the complaint to add David as a party in his capacity as an agent and hold him personally liable. In Wrangler v. Hawaiian Electric Co., Inc., 742 F.Supp. 1458, 55 EDP ¶40,350 (D. Haw. 1990), a court allowed the filing of a civil complaint naming certain individuals, who were not originally named as parties in the administrative complaint, as defendants because the facts of the administrative complaint implied their involvement in the discriminatory practice, and there was no prejudice because

³Under H.A.R. §§ 12-46-6.1(a) and (b)(2), a complaint may be amended by the Executive Director to name a new party prior to the commencement of proceedings before the Hearings Examiner. In Tseu ex rel. Shaw vs. Sam Teague, Inc., and Sam Teague, individually, Docket No. 94-001-E-P; aff'd, Civil No. 95-1164 (Cir. Ct. 1st Cir., February 7, 1996); appeal pending, Docket No. 19691 (Hawai'i Sup. Ct.), the Circuit Court upheld the Executive Director's amendment of the complaint to add a new party during the investigation.

they were on notice that they could be held individually liable. In this case, the administrative complaint did not have facts implying David's involvement in the discriminatory practice⁴ or placing him on notice that he could be held personally liable.

It appears that in denying the motion, the Hearings Examiner carefully balanced the goal of providing full relief to Smith with the unfairness of adding David as a party during the contested case hearing stage. The administrative complaint was filed on October 3, 1994, or 3 years and 3 months before the motion to amend. David was prejudiced by the passage of time before the motion was filed because his alleged participation in the reinstatement decision was known to Smith at the time of the complaint.

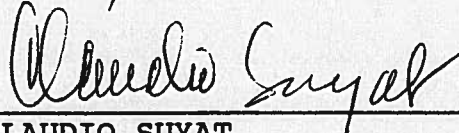
IV. ORDER

IT IS HEREBY ORDERED THAT the Petition for Declaratory Relief is summarily denied under H.A.R. § 12-46-63(b)(1).

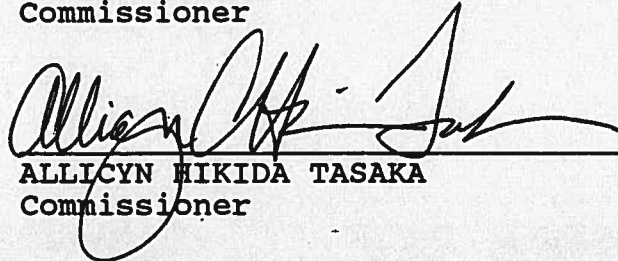
Petitioner may seek reconsideration under H.A.R. § 12-46-38 by filing a motion with ten days of receipt of this order. Petitioner may seek judicial review in the circuit court under H.R.S. §§ 91-8 and 14 within thirty days after service of the final decision and order.

⁴It is not implicit from the facts of the complaint that David was involved in the decision not to reinstate Smith after her pregnancy leave.

DATED: Honolulu, Hawaii April 14, 1998



CLAUDIO SUYAT
Commissioner



ALLILYN HIKIDA TASAKA
Commissioner



FAYE KENNEDY
Commissioner



JACK LAW
Commissioner



HARRY YEE
Commissioner

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DISSENT BY COMMISSIONER KENNEDY

I respectfully disagree. I believe that there were sufficient grounds to grant the motion to amend to add a new party for the reasons presented by the Executive Director.

DATED: Honolulu, Hawaii, _____

April 14, 1998

Faye Kennedy

FAYE KENNEDY